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Supreme Court, U.S.
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OCT 23 1987
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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

MELVIN R. HORNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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II. QUESTIONS PRESENTED

A. May a person be legally prosecuted and convicted under conspiracy law for an alleged conspiracy offense in which the only alleged unacquitted co-conspirator was a government agent during the final eight (8) months of the life of the conspiracy as alleged in the indictment?

B. Whether "good faith" is an appropriate jury instruction in a prosecution for conspiracy to defraud the government, 18 USC §371, as to which the courts of appeal differ.

III. LIST OF PARTIES

All parties to the cause of action are included in the caption.

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VI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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MELVIN R. HORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

The Petitioner, MELVIN R. HORNE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on direct appeal, United States v. Melvin R. Horne, on 24 August 1987.

VII. OPINIONS BELOW

The opinion of the Court of Appeals was a per curiam affirmance reported at _____ F.2d _____ and reprinted in the Appendix.

VIII. JURISDICTION

The case originated as a criminal prosecution in the United States District Court Northern District of Florida, Tallahassee Division. Upon conviction direct appeal of the final order, judgment and sentence, was timely prosecuted to the United States Court of Appeals, Eleventh Circuit, pursuant to 28 U.S.C. §1291. The oral argument panel affirmed without opinion on 02 July 1987. Rehearing and suggestion for en banc consideration was filed on 23 July 1987 and denied on 24 August 1987. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rules 20.1.

IX. STATUTES INVOLVED

18 U.S.C. §371

X. STATEMENT OF THE CASE

MELVIN R. HORNE was a former Assistant United States Attorney and later a practicing attorney (R37-332) who was jointly indicted with his uncle and law partner, Mallory E. Horne, (R1-1) after a two-and-a-half-year undercover investigation by the Federal Bureau of Investigation (F.B.I.). The F.B.I. enlisted two of the law firm's clients as agents. The F.B.I. used the firm to set up a cover corporation. The defense extensively centered on government overreaching, due process and entrapment.

The Indictment consisted of thirteen counts, co-defendant Mallory E. Horne was acquitted of all thirteen counts (R42-17-18). MELVIN HORNE was acquitted of nine of the thirteen counts (R42-16), Mr. HORNE was convicted of conspiracy to defraud the United States, mail fraud (Counts II and VII), and wire fraud (Count XII). MELVIN HORNE was sentenced on 26 November 1985 to a term of imprisonment of five years on Count I followed by five years total consecutive probation on the

remaining three counts (R8-325). Bail on appeal was denied by the district court and by order of the Eleventh Circuit over the signature of one of the panel members. The conspiracy count alleged in pertinent part:

> From on or about July 1, 1980, until on or about October 28, 1983, in the Northern District of Florida and other geographical districts of the United States, MELVIN R. HORNE and MALLORY E. HORNE, defendants herein, did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with Robert John Dugan, who is named as a coconspirator but not as a defendant, to defraud the United States . . . in violation of Title 18 United States Code, Section 371.

There were no other alleged coconspirators, "known or unknown." Mallory E. Horne was acquitted on all counts (R42-17-18). The only other alleged coconspirator, Robert J. Dugan, was acknowledged by the government as being an informant for the government and a government cooperative (R2-72; R7-259; R34-237). Robert Dugan began cooperating with the Federal Bureau of Investigation during the dates alleged for the

existance of the conspiracy. Dugan became an agent in early March 1983 (R21-82; R33-59) and continued to cooperate with the FBI during the last eight (8) months of the conspiracy as alleged in Count Iof the indictment.

Appellant argued to the Eleventh Circuit that conviction of the conspiracy count as alleged constituted a legal impossibility due to the fact that the proof allowed the jury to convict Mr. HORNE for conspiring with a government agent. The government answered that the issue should be governed by principles of withdrawal from a conspiracy. Mr. HORNE asserted in reply that the legal analysis of the government's argument was in fact a theory of prejudicial/nonprejudicial variance to an indictment, and went on to argue that an unconstitutional amendment to the indictment had occurred or in the alternative a prejudicial variance took place when the proof revealed that Mr. Dugan was a government agent during the life of the alleged conspiracy, leaving the conclusion from the allegations that MELVIN

HORNE conspired with Robert Dugan who was an acknowledged and admitted government agent.

Oral argument was held on 24 June 1987 in Miami, Florida before Judge Gerald B. Tjoflat, Judge Robert S. Vance, Judge Clarence W. Allgood.[1] The panel per curiam affirmed the conviction without a written opinion on 02 July 1987.

XI. REASONS FOR GRANTING THE WRIT

A. Important Question

The case in its present posture represents an improper broadening of the pervasive and wide sweeping nets of conspiracy prosecutions. Grunewald v. United States, 353 U.S. 391, 77 S.Ct 963, 1 L.Ed.2d 931 (1957), involved a conspiracy question which included application of the statute of limitations. The Court exercised discretionary certiorari to review the case as an "important question." The question of importance for the

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[1] Senior Judge, United States District Court, Northern District of Alabama, sitting by designation.

Court is the permissible extent of undercover investigations of lawyers who are approached by their clients turned government agents and perform legal services for those client-agents.

B. Conflicts

1. A Prejudicial Amendment of the Indiction Occurred at Trial.

In United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811 (1985), the Court addressed the issue of whether the Fifth Amendment's grand jury guarantee is violated when a defendant is tried under an indictment that alleges a certain fraudulent scheme but is convicted on a significantly narrower and more limited, though included scheme. The Court revised the definitions of "amendment" and "variance" to an indictment. The Court analyzed Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), and Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252 (1960). The Court held that the broadening of an indictment is an amendment which is constitutionally impermissible in that a

court cannot permit a defendant to be tried on charges that are not made in the indictment against him. Narrowing of an indictment at trial is not per se reversible. The charges may not be broadened through amendment except by the grand jury itself. To the extent that Bain stood for the proposition that it was an unconstitutional amendment to drop from the indictment allegations which were unnecessary to an offense, "narrowing" the indictment, Bain was rejected. United States v. Miller, supra, 105 S.Ct. at 1819.

The proof during the Horne trial broadened the charges by adding the fact that Robert Dugan was a government agent. The acquittal of Mallory Horne served to further amend the indictment by deletion of a necessary element, a co-conspirator who was not a government agent during the time periods set out in the indictment. The jury was therefore allowed to convict for conspiring with a government agent. Several cases since Miller have analyzed the effect of prejudicial amendments to the indictments.

United States v. Adams, 778 F.2d 1117 (5th Cir. 1985), a post Miller case, held that an amendment to the indictment is per se reversible because the jury may have convicted the defendant on a ground not charged in the indictment. The Fifth Circuit (JJ. Goldberg, Randall, Johnson) held that the jury should not be permitted to convict a person on a factual basis that effectively modifies essential elements of the offense. Mr. HORNE was before a lay jury on a conspiracy charge for an alleged agreement between himself and a person who for the last eight months of the charged time period was operating as a government agent. Additional modification of the essential elements in the prosecution of Mr. HORNE occurred by the acquittal of the only other jointly liable defendant. These facts resulted in a changing of terms of the coconspirator and "altered literally or in effect" the theory of liability after the grand jury had passed on the theory. Such an alteration literally or in effect by prosecution, proof, or court is not

constitutionally tolerable. United States v. Atisha, 804 F.2d 920 (6th Cir. 1986). The charging terms were altered. The facts did not conform to any theory of criminal behavior and were materially different from those alleged in the indictment. The variance crossed over the constructive amendment line because a substantial likelihood was created that Mr. HORNE was convicted for the offense of conspiring with a government agent. United States v. Hathaway, 798 F.2d 902 (6th Cir. 1986). The modification of the elements by proof at trial, United States v. Davis, 679 F.2d 845 (11th Cir. 1982), was prejudicial even if treated as a "variance."

The government is then left to argue that there was sufficient evidence prior to the legal termination of the conspiracy upon which the conviction could be based. The jury in the goverment argument, reasonably could have relied on prior acts or statements. The jury, just as reasonably, could have convicted Mr. HORNE for inadmissible coconspirator statements which

occurred, and were allowed into evidence, after the termination of the conspiracy.

There was no allegation by the grand jury of any "other" coconspirators (except Mr. Mallory E. Horne who was acquitted). The question of whether agent Dugan was a link between Mr. HORNE is therefore not legally present. The issue is similar to Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965), where:

> Although the evidence was sufficient to support the conspiracy charged, it was not the province of the jury to convict Sears merely upon finding that he had accepted money from [informant] Davis and furnished protection.

The proof could have established only that Mr. HORNE had "conspired" with informant Dugan, and "as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy." Id. In view of the posture of the evidence and the charge actually given by the court, the jury may well have believed that it could convict Mr.

HORNE simply by believing that he agreed with informer Dugan.

2. "Good Faith" is an Appropriate Jury Instruction for the Charge of Conspiracy to Defraud Under 18 U.S.C. §371.

The case below conflicts with the case of United States v. Hopkins, 744 F.2d 716 (10th Cir. 1984), en banc. The Tenth Circuit, on en banc rehearing, held that the failure of the given instructions to submit the issue of "good faith" required that convictions for mail fraud and conspiracy to use the mail to defraud be set aside, and the cases be remanded for new trial. In determining reversible error, the Tenth Circuit remarked as follows:

> The "good faith" instruction is required to be given as a separate subject. Thus instructions on wilfulness [sic], on aspects of intent, on untruth of representations or fraudulent statements are not sufficient for this purpose. There must be a full and clear submission of the good faith defense as such. United States v. Steiger, 373 F.2d 133 (10th Cir.). See also United States v. Beitscher, 467 F.2d 269 (10th Cir.); Mesch v. United States, 407 F.2d

> 1286 (10th Cir.). [emphasis by the court]
>
> Our holding as to the need for a good faith instruction in the above cases is intended to apply to both substantive and conspiracy counts for mail or wire fraud. [emphasis added]

United States v. Hopkins, supra, 744 F.2d at 718.

It is settled law that conspiracy to violate a criminal law is bottomed on an unlawful and willful intention, and the intent to accomplish an object cannot be alleged more clearly than by stating that the parties conspired to accomplish it. MELVIN HORNE was charged with a conspiracy to defraud the United States by hindering the Internal Revenue Service, 18 U.S.C. §371. It was Mr. HORNE's defense at trial that he acted in good faith without criminal intent and without guilty knowledge and that he was entrapped (Closing argument, R41-26) (See also R40-16).

In a conspiracy case, two different types of intent are generally required -- the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more

traditional intent to effectuate the object of the conspiracy. United States v. U.S. Gypsum Co., 438 U.S. 422, 443; 98 S.Ct. 2864, 2877; 57 L.Ed.2d 854 (1978), fn. 20. Fraudulent intent was therefore an element of the conspiracy charged in Count I of the Indictment. The Indictment charged that Mr. HORNE "did unlawfully, knowingly and willfully conspire, combine, confederate and agree to defraud" the United States by obstructing the Internal Revenue Service in its duly appointed task. When fraudulent intent is an element of the crime, the prosecution has the burden of proving such intent beyond a reasonable doubt. Spies v. United States, 317 U.S. 492, 497 (1943). "Good faith" constitutes an absolute defense to such crimes. Beck v. United States, 305 F.2d 595 (10th Cir. 1962), cert. denied, 371 U.S. 890.

The "good faith" instruction performs three (3) important functions. First, it tells the jury in straightforward terms that good faith is an absolute defense. Second, the instruction explains that the defense pertains to the state of

the defendant's mind at the time of the alleged crime and that he cannot be found guilty merely for making an honest mistake. Third, the instruction is careful to explain that, when good faith is interposed as a defense, it is the government's burden to prove the requisite bad faith beyond a reasonable doubt. See, e.g., United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982).

C. Error in the Court Below

1. The conspiracy as alleged and proven was a legal impossibility.

"It is impossible . . . for a man to conspire with himself." Morrison v. California, 291 U.S. 82, 92; 54 S.Ct. 281, 285 (1934). The theory is referred to as the traditional rule. The traditional rule merely recognizes, by definition, the legal impossibility of the existence of a criminal agreement under circumstances where all coconspirators are acquitted. The conclusion is sound and consistent with the definition of conspiracy. The essence of

a conspiracy is the agreement between two (2) or more individuals, neither being a government agent or informer. Iannelli v. United States, 420 U.S. 777, 95 S.Ct. 1284, 1289 (1975). "[T]he existence of a coconspirator is not only an element of the crime [of conspiracy], it is the essence of the crime." United States v. Pearson, 667 F.2d 12, 13 (5th Cir./Unit B 1982).[2] The principle that a single defendant cannot be convicted of conspiracy in the same proceeding in which all of his alleged coconspirators are acquitted is founded on a failure of proof of an essential element of the crime as a matter of law. Herman v. United States, 289 F.2d 362 (5th Cir. 1961), cert. denied 368 U.S. 897 (1961).

Count I of the indictment, as amended by the Government's proof would set forth:

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[2]Unit B, former Fifth Circuit case, Section 9 (1) of Public Law 96-452, 10 October 1980, binding on the Eleventh Circuit absent en banc opinion, Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982).

> From on or about July 1, 1980, until on or about October 28, 1983,... MELVIN R. HORNE . . . did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with Robert John Dugan, [who was a government agent from early March 1983 and] who is named as a coconspirator but not as a defendant, to defraud the United States by impeding . . . the Intrnal Revenue Service.

The original indictment did not allege Mr. HORNE conspired with "other persons to the grand jurors known and unknown." Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951), Cf., United States v. Albert, 675 F.2d 712, 713 (5th Cir. 1982). A person can be convicted of conspiring with persons who are not identified by name in an indictment so long as the indictment asserts that such other persons exist and the evidence supports such an assertion. Rogers v. United States, 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344, 350 (1950). No such identification or assertion is present in the indictment after the deletion of Mr. Mallory Horne and the addition of Mr. Dugan's government agent status.

Where two (2) defendants have been tried before the same jury with the same evidence being produced, a not guilty verdict on the conspiracy count as to one defendant necessarily precludes the conviction of the alleged coconspirator. United States v. Roark, 753 F.2d 991 (11th Cir. 1985); United States v. Sheikh, 654 F.2d 1057 (5th Cir./Unit A 1981), cert. denied, 455 U.S. 991, 102 S.Ct. 1617 (1982); United States v. Klein, 560 F.2d 1236 (5th Cir. 1977), cert. denied, 434 U.S. 1073, 98 S.Ct. 1259 (1978); United States v. Pearson, supra 662 F.2d at 13 (5th Cir. Unit B 1982) (per curiam); United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985). "A conspiracy cannot be committed by a single individual acting alone . . . ." Herman v. United States, supra 289 F.2d, at 368.

2. The jury should have been instructed on the Sears [v.United States, 343 F. 2d. 139, 142 (5th 1965)] Rule.

Trial counsel[3] did not request a Sears instruction. No objection was made to the jury instructions on the Sears rule. The jury instruction issue was not raised in a motion in the district court.[4] However, the Court would be justified in resolving the issue "where the proper resolution [is] beyond any doubt . . . or where 'injustice might otherwise result.'" Singleton v. Wulff, 428 U.S. 106, 121; 96 S.Ct. 2868, 2877; 49 L.Ed.2d 826 (1976), citations omitted.

The failure to instruct the jury on the Sears rule in the context of the facts of the case was plain error. Substantive rights are implicated. Without an instruction on the Sears rule the jury may well have believed it could convict Mr. HORNE for 'conspiring' with Dugan after March 1983. Cf.

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[3]Other counsel represented Petitioner at trial.

[4]The "Dugan-as-Agent" was a part of the motion to dismiss for government misconduct raised pretrial, during trial and post-trial.

United States v. Lively, 803 F.2d 1124, 1126 (11th Cir. 1986). As in Lively, Mr. HORNE was induced into considerable post termination conversation (Gov. Exhibits 1DNT (1-2), 31 PNT (1-2), 52 VT (1), 95 PT (1), 57 NT (1-2), 102 PT (1), 103 PT (1), 104 PT (1), 105 PT (1), 106 PT (1), 107 PT (1), 110 PT (1). Relying on this evidence, the jury may have concluded that Mr. HORNE and Mr. Dugan formed the charged conspiracy on a later date, because nothing in the court's charge to the jury indicated that Dugan could not have conspired with appellant at that time.

The deficiency is inherent in the pattern jury instructions of the Eleventh Circuit (Appendix) utilized by the trial court. "First that two or more persons came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the Indictment." (Appendix). The deficiency here should be noted by the Court and corrected by granting the writ.

The failure of the district court to give the requested good faith instruction as to Count I of

the Indictment not only deprived Mr. HORNE of an instruction on his theory of the case, but the modified and abbreviated instruction that the district court did give actually was a misstatement of the correct standard of law where the Indictment alleged a conspiracy to defraud.

The pattern jury instructions of the Eleventh Circuit do not provide for good faith as a defense to a conspiracy to defraud. Where one is acting in concert with a government agent, the broader approach of the Tenth Circuit is more appropriate. The failure to properly instruct the jury therefore deprived Petitioner of his right to have the jury properly instructed on his theory of defense. Cf. James v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.E.2d 468 (1978).

VIII. CONCLUSION

For the reasons set forth above, it is respectfully submitted that certiorari should be favorably entertained. The overlap of time period from Dugan's cooperation through time of the

conclusion of the alleged "conspiracy" also merged with "Dugan-as-Agent" in the remaining counts.

In the allegation of "The Scheme," which was incorporated by reference pleading permissible under Fed. R. Crim. P. 7(c)(1), the Indictment alleged (R1-1-4 to 5) Mr. HORNE devised a scheme to defraud. The purpose of "the scheme" was to assist agent Robert John Dugan evade taxes, to assist agent Robert John Dugan in hiding assets, preparing false documents of the source of agent Robert John Dugan's income, and arranging the covert transfers of assets belonging to agent Robert Dugan. Coupled with the Pinkerton[5] theory of vicarious liability, upon which the jury was instructed, the jury no doubt convicted Mr. HORNE for the wrongdoing of a government agent. Review by the Supreme Court is appropriate to set the parameters of permissible governmental conduct in

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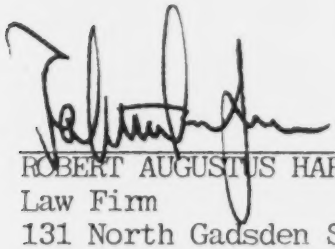
[5]Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

covert investigations. The definition of conspiracy should be structured to preclude a conspiracy with a government agent. The good faith defense concept should be enunciated in the concept of a conspiracy to defraud.

Respectfully submitted,



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OCTOBER TERM, 1987

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Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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I. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutional Provisions

United States Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (emphasis added).

B. Statutory Provisions

18 U.S.C. §371

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is as misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

II. RECORD SHOWING PROPER AND TIMELY RAISING OF FEDERAL QUESTIONS

A. Defendant's Written Requested Jury Instructions (R7-275).

B. Charge Conference (R40-25).

C. Defendant's Motion for New Trial - Good Faith Objection [R8-305-¶16(d)].

III. OPINIONS OF LOWER COURT:

A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3927

D.C. Docket No. 84-7023

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELVIN R. HORNE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(July 2, 1987)

Before TJOFLAT and VANCE, Circuit Judges, and ALLGOOD*, Senior District Judge.

PER CURIAM:
AFFIRMED. See Circuit Rule 25.

---

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Judgment Entered: July 2, 1987
For the Court: Miguel J. Cortez, Clerk

By: /S/ David Maland
Deputy Clerk
ISSUED AS MANDATE: Oct. 05, 1987

B.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3927

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELVIN R. HORNE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion July 2, 1987, 11 Cir. 198__, _____F.2d_____).

(August 24, 1987)

Before: TJOFLAT and VANCE, Circuit Judges, and ALLGOOD*, Senior District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Robert S. Vance

United States Circuit Judge

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

IV. JUDGMENT AND DECREE SOUGHT TO BE REVIEWED:

NORTHERN DISTRICT OF FLORIDA

MELVIN R. HORNE DOCKET NO. TCR 84-07023

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date -- November 26, 1985.

Counsel -- XX With Counsel Gregory Wilson

Plea -- X Not Guilty

Finding & Judgment: There being a verdict of X GUILTY. Defendant has been convicted as charged of the offenses of Violating Title 18, United States Code, Sections 371, 1343, 1341, and 1952(a)(1), as charged in Counts 1, 2, 7, and 12 of the Indictment.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the

contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and order that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, on Count 1.

Special Conditions of Probation

On Count 2, the defendant is committed to the custody of the Attorney General for a period of five (5) years. Execution of sentence is suspended and the defendant is placed on probation for a period of five (5) years, to begin at the conclusion of the sentence imposed in Count 1.

On Count 7, the defendant is committed to the custody of the Attorney General for a period of five (5) years. Execution of

sentence is suspended and the defendant is placed on probation for a period of five (5) years, to run concurrently with the probation imposed in Count 2.

On Count 12, the defendant is committed to the custody of the Attorney General for a period of five (5) years. Execution of sentence is suspended and the defendant is placed on probation for a period of five (5) years, to run concurrently with the probation imposed in Counts 2 and 7.

All probation is to run consecutive to the sentence of imprisonment imposed in Count 1.

The defendant may voluntarily surrender, at his own expense, to the designated institution, or if designation is not made prior to January 3, 1986, the defendant

shall surrender to the U. S. Marshal, Tallahassee, Florida, 12:00 noon, January 3, 1986.

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

FILED NOV. 26, 1985

Signed by

X U. S. District Judge /S/ Maurice M. Paul
MAURICE M. PAUL
Date 11/26/85

V. OTHER RELEVANT PORTIONS OF THE RECORD

A. U.S. Eleventh Circuit, District Judges Association, Pattern Jury Instructions:

4.1

GENERAL CONSPIRACY CHARGE

18 U.S.C §371

Title 18, United States Code, Section 371, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the

"overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; (emphasis added)

Second: That the Defendant willfully became a member of such conspiracy;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each

other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

B.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

vs. CASE NO. TCR 84-07023-MMP

MELVIN R. HORNE,

Defendant.

COURT'S INSTRUCTIONS
TO THE JURY (R8-297)

What the evidence in the case must show beyond a resonable doubt is:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant willfully became a member of such conspiracy;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a

conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

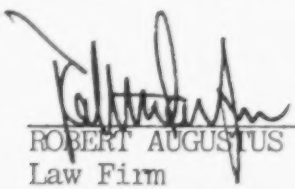
If you find a defendant guilty of conspiracy as charged in Count I, you may also find that particular defendant guilty of a substantive offense, in this instance mail fraud, wire fraud and foreign travel in aid of racketeering, provided that the evidence as to these substantive offenses proves the substantive offense beyond a reasonable doubt, shows that the offense was committed by a member of the conspiracy pursuant to the conspiracy and that at the time it was committed the particular defendant was a member of the conspiracy. So it is that a defendant may be found guilty of a substantive offense even though he did not participate in the act constituting the offense. The reason for this is that under the law, a member of a conspiracy who commits a substantive offense pursuant to a conspiracy is the agent of all who are then members of the conspiracy and all who are members may be found

guilty on account of the conduct of their agent, their fellow member of the conspiracy.

VI. CERTIFICATE OF SERVICE

I, Robert Augustus Harper, a member of the Bar of this Court, hereby certify that on this 8th day of December 1987 three copies of the foregoing Appendix to Petition for Writ of Certiorari were mailed, first class postage prepaid to Kenneth Sukhia, Esquire, 227 North Bronough Street, Suite 4014, Tallahassee, Florida 32301, counsel for all the respondents herein. I further certify that on this 8th day of December 1987 three copies of the foregoing Appendix to Petition for Writ of Certiorari were mailed, first class postage prepaid, to Charles Fried, Esquire, Solicitor General, The Department of Justice, Washington, D.C. 20530.

Respectfully submitted,



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Supreme Court, U.S.
FILED
MAR 31 1988

No. 87-1013

In the Supreme Court of the United States

OCTOBER TERM, 1987

MELVIN R. HORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment was constructively amended by the proof at trial.

2. Whether the evidence was sufficient to sustain petitioner's conspiracy conviction.

3. Whether the district court's jury instructions on conspiracy constituted plain error.

4. Whether the district court properly instructed the jury on the defense of good faith.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1013

MELVIN R. HORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 4) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1987. A petition for rehearing was denied on August 24, 1987 (Pet. App. 5). The petition for a writ of certiorari was filed on October 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner and his law partner, Mallory E. Horne, were charged in a 13-count indictment returned in the United States District Court for the Northern District of Florida. Count 1 of the indictment charged that from July 1, 1980,

to October 28, 1983, petitioner and Mallory Horne conspired with an unindicted co-conspirator, Robert John Dugan, to defraud the Internal Revenue Service in the collection of taxes (18 U.S.C. 371). The remaining counts charged petitioner and Mallory Horne with mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), and Travel Act violations (18 U.S.C. 1952). After a jury trial, petitioner was convicted of conspiring to defraud the Internal Revenue Service (Count 1), wire fraud (Count 2), mail fraud (Count 7), and use of an international wire communication to distribute the proceeds of an unlawful activity (Count 12). He was sentenced to five years in prison to be followed by five years of probation. Mallory Horne was acquitted on all charges. The court of appeals summarily affirmed (Pet. App. 4).

1. The evidence from the six-and-a-half week trial is set forth in detail in the government's brief in the court of appeals (at 1-16). The evidence showed that petitioner masterminded a money laundering operation to hide from the Internal Revenue Service (IRS) illegally obtained assets of Robert John Dugan, a drug smuggler and an unindicted co-conspirator. Besides Dugan's testimony, the evidence included a number of audio and video recordings of conversations between petitioner and an informant, Mark Stroud, as well as recordings of conversations between petitioner and an undercover FBI agent. During those conversations, petitioner outlined the method he used to launder Dugan's assets, he described the details of the scheme to defraud the IRS, he discussed the fraudulent documentation that he prepared to facilitate the scheme, and he rehearsed Dugan on the false scenario that Dugan was to present when questioned by law enforcement authorities. In addition, petitioner gave two confessions acknowledging that he laundered Dugan's drug money and

hid it from the IRS in an offshore corporation that he set up for that purpose.

2. In 1978, Dugan began importing marijuana and cocaine into the United States as a pilot or co-pilot on trips to South America. Following his arrest in November 1978 for marijuana smuggling, Dugan hired petitioner as his attorney and told petitioner about his plans to continue smuggling drugs. Using money derived from his drug smuggling activities, Dugan purchased a house in late 1978 and made $170,000 in cash improvements on it between 1979 and 1980. In July 1980, Dugan bought a Piper Aztec airplane for $73,000 in cash. Five months later, Dugan bought 160 acres of land in Levy County, Florida, to develop an airfield to hide and house smugglers' planes.

Petitioner handled the arrangements and paperwork for each of those transactions. He also told Dugan that the purchase of the assets in his own name would likely lead to an audit by the IRS and possible forfeiture of the assets because they were purchased with the proceeds of drug smuggling. In late 1980 and early 1981, Dugan asked petitioner to set up a scheme to launder his cash and property. Petitioner consulted with Mallory Horne, who arranged a meeting with Mark Stroud, a former bank vice president.

At a meeting on January 7, 1981, petitioner and his law partner told Stroud that Dugan was a convicted drug smuggler who had an airplane, a large tract of land and between $300,000 and $500,000 in cash that he needed to hide from the IRS. In a later meeting that same day, petitioner told Stroud that he needed to put Dugan's assets in someone else's name. Although Dugan was reluctant to use Stroud's services, he eventually agreed to have Stroud launder his money after petitioner and Mallory Horne assured him that Stroud could be trusted. Unknown to petitioner and Mallory Horne, however, Stroud was a government informant, and he alerted the FBI about the

scheme to hide Dugan's assets. In subsequent recorded meetings on January 15 and 26, 1981, petitioner discussed with Dugan and Stroud the details of a plan to hide Dugan's assets by placing them in the name of an offshore company. On January 29, 1981, petitioner and Stroud traveled to the Bahamas and set up the offshore company, Beauly Investments Ltd.

After he returned from the Bahamas, petitioner proceeded to create false documents to show that Beauly Investments Ltd. had lent Dugan money for the down payment on his house and the yearly payments on the 160-acre tract of land. In December 1981, petitioner created additional false documents showing that the 160-acre tract of land had been transferred to Beauly Investments Ltd. because Dugan had not repaid the loan. To explain the source of Dugan's income, petitioner also prepared a bogus employment contract between Dugan and Beauly Investments Ltd. reflecting that Dugan was the property manager of the 160-acre tract of land. Since the airplane was purchased before Beauly Investments Ltd. was formed, petitioner and Stroud arranged to have another individual, Donald Carter, listed as its owner.

On September 10, 1981, Stroud introduced petitioner to an undercover FBI agent, Matthew Pellegrino, who posed as a money launderer named Matthew Garfolo. Two weeks later, petitioner met with Pellegrino and discussed establishing offshore companies for two of Dugan's associates. Later in October 1981, petitioner asked Pellegrino to assist him in laundering $50,000 in cashier's checks that Dugan had withdrawn from his Cayman Islands account and made payable to petitioner. For a fee, Pellegrino agreed to negotiate the checks in order to prevent the funds from being traced back to Dugan or petitioner.

Throughout the period of the undercover operation, petitioner and Dugan continually expressed concern that the IRS would audit Dugan. In recorded meetings on October 20 and 22, 1982, petitioner met with Dugan and Pellegrino to plot a strategy to lie to the IRS about Dugan's finances. During those sessions, petitioner questioned Dugan to assure himself that Dugan understood the false explanation that he would give about where he obtained the money to purchase his assets and how those assets ended up in the names of other persons and entities. Petitioner, Dugan, and Pellegrino also discussed an additional $300,000 in traceable assets acquired by Dugan between 1978 and 1982 that had not yet been hidden by phony documents or offshore companies. Petitioner suggested a number of methods to conceal those assets, such as attributing certain monies to Dugan's deceased brother, preparing additional phony loans, destroying ledgers detailing Dugan's smuggling activities, characterizing money used to fund Beauly Investments Ltd. as a lease payment, and telling the IRS that Dugan only brokered the purchase of the Piper Aztec airplane. By the end of the meetings, petitioner, Dugan, and Pellegrino had made up explanations for all but $20,000 of the $300,000 in traceable assets.

On October 27, 1982, petitioner was interviewed by an IRS agent. Petitioner lied to the agent about Dugan's financial affairs. Consistent with the scheme he had set up, petitioner told the IRS agent that Beauly Investments Ltd. was a legitimate group of offshore investors and that Dugan had borrowed money from the company in connection with his purchase of the 160-acre tract of land. He also told the agent that the property had reverted to Beauly Investments Ltd. when Dugan was unable to repay the loans and that Dugan was employed by the company. To

support those claims, petitioner produced the fraudulent documents that he had prepared earlier.

3. In March 1983, FBI agents confronted Dugan with their evidence of the money laundering scheme, and he agreed to cooperate in the investigation. Subsequently, on October 28, 1983, a search warrant was executed at petitioner's law office. In the course of the search the agents seized the fraudulent documents prepared by petitioner to hide Dugan's assets, receipts reflecting petitioner's travel, and records of wire-transfers of money. After learning that Pellegrino was an FBI agent, petitioner stated that he wanted to see the United States Attorney. Later that evening, petitioner confessed twice to laundering Dugan's drug money through Beauly Investments Ltd.

ARGUMENT

1. Petitioner first contends (Pet. 7-12) that the proof at trial constructively amended the indictment because the evidence showed that Dugan began cooperating with the government in March 1983, whereas the indictment alleged that the conspiracy continued until October 28, 1983. Petitioner argues that since Mallory Horne was acquitted and since petitioner could not have conspired with a government agent, the conspiracy count was constructively amended to allege that the conspiracy ended eight months earlier than alleged in the indictment. That argument is wholly without merit.

The jury's acquittal of Mallory Horne is plainly irrelevant to whether the indictment was constructively amended. A constructive amendment occurs when the evidence at trial or the jury instructions broaden the scope of the indictment by allowing a defendant to be convicted of an offense different from that charged in the indictment. See *United States* v. *Miller*, 471 U.S. 130, 135-145 (1985); *Stirone* v. *United States*, 361 U.S. 212, 218-219

(1960). That did not happen here; the proof at trial established the same conspiracy that was alleged in the indictment. The evidence that Dugan began cooperating with the government before the alleged termination date of the conspiracy did not alter an essential or material element of the conspiracy charged in the indictment. At most, that evidence narrowed the indictment by showing that the conspiracy was of shorter duration. It could not have prejudiced petitioner's right to be apprised of the charges against him or his right to plead the indictment as a bar to subsequent prosecutions. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962). Moreover, because the indictment alleged and evidence was introduced to show that petitioner also conspired with Mallory Horne, the mere fact that Dugan withdrew in March 1983 did not mean that the conspiracy terminated at that time.

2. Petitioner makes the related contention (Pet. 15-18) that the conspiracy was "legally impossible" because the evidence was insufficient to show that he conspired with either Dugan or Mallory Horne. That contention is predicated in the first instance on the erroneous assertion (Pet. 11-12) that petitioner could not be found guilty of conspiring with Dugan because Dugan became a government informant in March 1983. Petitioner's assertion is plainly wrong since a conspiracy is complete once there is an agreement to accomplish an unlawful object and one or more overt acts are undertaken to implement the agreement. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *United States* v. *Feola*, 420 U.S. 671, 694 (1975). In this case, the evidence showed that the conspiracy began in 1980 and that Dugan and petitioner actively participated in the money laundering scheme to defraud the IRS for two-and-a-half years before Dugan decided to cooperate with the government. To be sure, petitioner could not conspire with Dugan after Dugan began coop-

erating with the government. But Dugan's withdrawal in March 1983 did not affect either his or petitioner's liability for the conspiracy or the substantive offenses occurring prior to that time; it merely precluded Dugan from being liable for substantive offenses occurring after his withdrawal. See, *e.g.*, *United States* v. *Gonzalez*, 797 F.2d 915, 916-917 (10th Cir. 1986); *United States* v. *Marolla*, 766 F.2d 457, 461 (11th Cir. 1985); *United States* v. *Read*, 658 F.2d 1225, 1232 (7th Cir. 1981); *United States* v. *Monroe*, 552 F.2d 860, 864 (9th Cir.), cert. denied, 431 U.S. 972 (1977).

Petitioner's contention that a conspiracy was legally impossible is also predicated on the erroneous proposition (Pet. 16-18) that he could not have conspired with Mallory Horne because the jury acquitted Mallory Horne. As this Court has repeatedly made clear, jury verdicts need not be consistent, because a jury may render an erroneous verdict for reasons of lenity, compromise, or mistake. *United States* v. *Powell*, 469 U.S. 57, 65 (1984); *Standefer* v. *United States*, 447 U.S. 10, 22-25 (1980); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932). The jury's acquittal of Mallory Horne therefore is not equivalent to a finding by the jury that petitioner did not conspire with him. See *United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 331-332 (5th Cir. 1980). Instead, the determination whether petitioner's conviction should be upheld is judged by the well-established principles governing review of the sufficiency of the evidence. *United States* v. *Powell*, 469 U.S. at 67. Under that standard of review, the evidence was clearly sufficient to establish that petitioner conspired with Mallory Horne as well as with Dugan.[1]

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[1] Petitioner relies (Pet. 16, 18) on the rule requiring consistency in conspiracy verdicts derived from *Herman* v. *United States*, 289 F.2d

3. Petitioner's real complaint (Pet. 10-11, 18-21) appears to be that the jury may have found him guilty of conspiring with Dugan after Dugan began cooperating with the government because the district court did not give the jury an instruction based on *Sears* v. *United States*, 343 F.2d 139 (5th Cir. 1965), to the effect that a person cannot conspire with a government informant. That contention is likewise meritless.

As petitioner concedes (Pet. 19), he neither requested a *Sears* instruction nor objected to the district court's failure to give the jury such an instruction. His claim therefore

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362 (5th Cir.), cert. denied, 368 U.S. 897 (1961). In *Herman*, the court held that the acquittal of all but one alleged co-conspirator in a joint trial mandates acquittal of the remaining co-conspirator. By its terms, that rule did not apply in this case because petitioner was charged with conspiring not only with Mallory Horne, but also with an unindicted co-conspirator, Dugan.

In any event, the validity of the rule articulated by the Fifth Circuit in *Herman* is doubtful. The *Herman* court cited no authority for the rule and it did not cite, discuss, or distinguish this Court's decisions in *Dunn* v. *United States, supra*, or *United States* v. *Dotterweich, supra*. Indeed, the Fifth Circuit has itself questioned the soundness of the rule and has "limited reliance on [the *Herman* rule] except in its narrowest application." *United States* v. *Davila*, 698 F.2d 715, 720-721 (5th Cir. 1983). See also *United States* v. *Albert*, 675 F.2d 712, 713 (5th Cir. 1982); *United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 331-332 (5th Cir. 1980).

Most significantly, *Herman* was decided before this Court decided *United States* v. *Powell, supra*, and *Standefer* v. *United States, supra*. The only court of appeals to have recently reevaluated the *Herman* rule has concluded that it does not survive the *Powell* decision. See *United States* v. *Valles-Valencia*, 823 F.2d 381, 382 (9th Cir. 1987). See also *Government of the Virgin Islands* v. *Hoheb*, 777 F.2d 138, 142-143 (3d Cir. 1985) (Garth, J., concurring) ("the rule of consistency since *Standefer* and *Powell* is no longer a viable doctrine"). The Eleventh Circuit recently granted rehearing en banc to consider the issue. *United States* v. *Andrews*, No. 87-3109.

must be measured against the plain error standard. Fed. R. Crim. P. 30, 52(b); *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Moreover, petitioner did not argue before the court of appeals that the district court erred in failing to give a *Sears* instruction. Consequently, even the question whether the failure to give the additional instruction was plain error is not properly before this Court. See *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the plain error doctrine authorizes a reviewing court "to correct only 'particularly egregious errors,' * * * [and] is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982)). See also *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) (in reviewing jury instructions, the plain error doctrine must be reserved for the "rare case"). No such error occurred here. In setting forth the essential elements of a conspiracy, the district court charged the jury that it was required to find that "one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or 'overt acts') described in the indictment" and that "such 'overt act' was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy" (Pet. App. 16). The ten overt acts set forth in the indictment (R.E. 22-23) were alleged to have occurred between January 8, 1981, and February 4, 1982, before Dugan began cooperating with the government. Accordingly, the district court's jury charge did not allow the jury to find petitioner guilty of conspiracy based on his association with Dugan after March 1983. The jury charge, therefore, clearly did not rise to the level of plain error.

4. Finally, petitioner contends (Pet. 12-15) that the decision below conflicts with *United States* v. *Hopkins*, 744 F.2d 716 (1984) (en banc), in which the Tenth Circuit held that a defendant charged with mail fraud and conspiracy to commit mail fraud is entitled to have the jury instructed on the defense of good faith when the instruction is timely requested and the evidence supports that defense. Petitioner, however, never claimed before the court of appeals that the district court's jury instructions on the defense of good faith were inadequate. Petitioner may not assert that claim now for the first time. In any event, petitioner's belated complaint about the jury charge is plainly without merit because the district court in fact instructed the jury on the defense of good faith.[2]

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[2] Petitioner characterizes (Pet. 20-21) the district court's jury instruction as "modified and abbreviated" and complains that the jury was not instructed on his theory of defense. To the contrary, the district court fully explained the good faith defense to the jury (R.E. 37):

> Good faith is a complete defense to those charges in the indictment alleging "intent to defraud" since good faith on the part of the defendant is inconsistent with intent to defraud or wilfullness which is an essential part of the charges. The burden of proof is not on the defendant to prove his good faith, of course, since he has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted with specific intent to defraud as charged in the indictment.
>
> One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent. On the other hand, an honest belief on the part of the defendant that a particular undertaking was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as used in these instructions if, in carrying out that undertaking, the defendant knowingly made false and fraudulent representations to others with specific intent to deceive them.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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